Supreme Court, U.S.
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No. 94-820

In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation award when successful retraining and reemployment efforts increase the worker's earning capacity.

LIST OF PARTIES

The parties to the proceeding resulting in the decision below are:

John Rambo

Metropolitan Stevedore Company[1]; and

Director, Office of Workers' Compensation Programs, United States Department of Labor

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[1] In accordance with Rules 24.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Ninth Circuit (J.A. 75-78) is reported at 28 F.3d 86. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (J.A. 79) is unpublished. The Decision and Order of the Benefits Review Board (J.A. 70-74) and the Decision and Order of the Administrative Law Judge (J.A. 63-69) are unreported.

JURISDICTION

The Decision of the United States Court of Appeals for the Ninth Circuit was filed on June 24, 1994. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing *En Banc* filed by Metropolitan was denied on August 10, 1994. The Petition for a Writ of Certiorari was filed on November 7, 1994, and granted on January 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2(10), 8(c)(21), 8(h), and 22 of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA" or "the Act"), 33 U.S.C. Sections 902(10), 908(c)(21), 908(h), and 922, provide in relevant part as follows:

> 2(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;. . . .
>
> * * *
>
> 8(c)(21) In all other cases in this class of disability the compensation shall be 66-2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.
>
> * * *

8(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * *

Sec. 22. Upon his own initiative, or upon the application of any party in interest, (including an employer or carrier which has been granted relief under section 8(f), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commission may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a

new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

STATEMENT

John Rambo injured his back and leg on September 9, 1980. In November 1983, an Administrative Law Judge approved a stipulation that the injuries had lessened his weekly capacity to earn wages as a longshoreman by $120.24 and, pursuant to 33 U.S.C. Section 908(c)(21), awarded weekly benefits of $80.16[2] A few years later, Mr. Rambo became eligible for and completed necessary retraining, soon obtaining a position as a crane operator,

[2] The stipulation was that Mr. Rambo's injury had caused "an overall current permanent partial disability equivalent to 22½% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability." (J.A. 4)

a much higher paying and less physically strenuous position.[3]

Metropolitan sought modification of the original award, contending that continuing benefits were no longer appropriate because the retraining and successful search for work as a crane operator had increased Mr. Rambo's earning capacity to the point that his economic disability had ended. Mr. Rambo argued that his original award could be reduced only if his *physical* condition had improved.

The Administrative Law Judge rejected Mr. Rambo's argument, determined that his new skills and job had ended the adverse economic effects of the injury, and ordered benefits stopped.[4] The Benefits Review Board affirmed.

Mr. Rambo appealed to the United States Court of Appeals for the Ninth Circuit, basing jurisdiction upon 33 U.S.C. Section 921(c). The Court reversed the earlier decisions, rebuffed the arguments advanced by Metropolitan and the Director, rejected the Fourth Circuit's analysis in *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*,

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[3] The new skills generated earnings of $1,505.21 weekly at the time modification was granted, a figure nearly triple the wages earned before injury in less skilled longshore work. *Rambo*, 28 F.2d at 86, (J.A. 76).

[4] The Administrative Law Judge recognized that mere higher earnings are not determinative of a change in earning capacity and, after considering inflation rates, salary increases, the permanency of work as a crane operator, and the prospects for continued work if the present position were lost, found it "evident that the Claimant no longer has a wage-earning capacity loss." (J.A. 68)

776 F.2d 1225 (4th Cir. 1985), and ordered benefits continued at the original level because

> [A] mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition.

Rambo, 28 F.3d at 87 (J.A. 77). Requests for rehearing were filed by Metropolitan and the Director, OWCP. Both requests were denied and the accompanying Suggestions for Rehearing *En Banc* rejected.

SUMMARY OF ARGUMENT

Some loss of earning capacity is a prerequisite to any award of LHWCA compensation. Except in the situations in which the economic effects of injury are conclusively presumed,[5] proof that a work-related impairment has lessened the workers' ability to earn is essential. Without that proof, no statutory disability exists. Without disability, no award of compensation can be entered.

Despite the fact that the primary focus of the LHWCA is economic, the Ninth Circuit has ruled that compensation initially premised upon diminished earning capacity must continue at the same rate even after the

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[5] See 33 U.S.C. §§ 908(c)(1-20); *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980).

lost ability to earn is regained unless – and only unless – the worker's *physical* condition improves.

The Ninth Circuit's interpretation of Section 22 is not only at odds with that of the Fourth. It violates the basic rule that courts must give effect to the clear meaning of statutes as written. It also strays far from the guidance provided by the past opinions of this Court, the most recent decisions issued by the other Circuit Courts and – most significantly – the history and intent of the Act itself.

Nothing in the history of the LHWCA or its many interpretations by this Court supports the view that Congress intended to distinguish between physical and economic conditions when it established the two prerequisites to award modification. Just as any mistake of fact may justify modification, so too does any change in the circumstances – the "conditions" – which together justified the original award suffice. As noted by Professor Larson,

> Although the beginning point and usually the main concern of an inquiry into change in condition for reopening purposes is claimant's relative physical condition, and although a number of states strictly confine change in condition to physical condition, [footnote omitted] it should not be forgotten that disability in the compensation sense has an economic as well as a medical component; [footnote omitted] accordingly a change in claimant's ability to get or hold employment, or to maintain his earlier earning level, could logically be considered a 'change in condition,' even though claimant's physical condition may have remained unchanged.

3 Larson, *The Law of Workmen's Compensation*, § 81.31(e), p. 15-1030 (1993).

The Ninth Circuit's opinion identifies two bases for its conclusion that physical change is a prerequisite to modification. The first – the canon of statutory construction that a lack of Congressional response to uniform court interpretations of statutory language implies approval – was misapplied. The decisions identified by the Ninth Circuit did *not* hold that physical change was a necessary prerequisite to adjustment of LHWCA awards.[6] This Court warned about the dangers of reliance upon *dicta* in *Cohens v. Com. of Virginia*, 19 U.S. 264, 369 (1821).

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and

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[6] For example, the Ninth Circuit panel characterized the holding in *McCormick S.S. Co. v. United States Employees Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), as requiring proof of change in a worker's physical condition. The actual holding in *McCormick* was both more narrow and, in this Petitioner's judgment, unassailable. McCormick S.S. Co.'s request to enjoin modification was granted because the worker had shown only a "decrease in wages earned" and failed to present any evidence of a "decrease in earning capacity." 64 F.2d, at 86. In addition, the *McCormick* decision contains an express acknowledgment that adjustments to existing awards of permanent partial disability may be properly ordered when changes in wage-earning capacity are proven.

> considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

The Ninth Circuit ignored that warning in this case.

The second underpinning of the Ninth Circuit's narrow interpretation of Section 22 must have been the unexpressed belief that Congress intended Section 22's scope to be narrow. The history of the LHWCA does not support this view.

Future changes to vocational circumstances are at least as likely as changes in physical condition. Either type of change can affect earning capacity and both may justify benefit adjustment. Absolutely nothing in the LHWCA's lengthy history implies that Congress intended that injured workers who "recover" economically should maintain the benefits lost to those who recover physically. Nothing in the history suggests that only the medically stable should suffer when the combined effects of injuries and changes in economic realities dramatically decrease earning abilities. The Ninth Circuit's opinion resulted from an over-focus on traditional rules of finality and *res judicata*. Those rules have been displaced by Section 22. If the prospect of an uncertain future troubles the parties, Congress has provided a single remedy: settlement.

In both legal and general usage, the normal meaning of "conditions" is "circumstances," precisely the term used by both House and Senate Committees in describing Section 22's scope. The Ninth Circuit should have applied this natural reading of the statute and recognized that

any change to any of the circumstances upon which a determination of wage-earning capacity depends may justify modification.

ARGUMENT

THE STATUTORY SCHEME

From its inception the purpose of the LHWCA has been to provide injured workers with compensation during periods of inability to earn earlier wages and has measured the amounts payable by the degree of economic harm sustained. The LHWCA's approach to determining the amounts payable as compensation for work-related injury was reviewed at length by this Court in *Potomac Electric Power Company, supra.*

The basic scheme is straightforward. Compensation is paid for "disability," an economic concept. Except in the so-called "scheduled" cases for which Congress has conclusively determined the degree of economic harm caused by injury, compensation is not payable under the LHWCA unless the injury lessens the employee's earning power. *See* 33 U.S.C. § 902(10); *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750 (1st Cir. 1992); *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988); *Fleetwood, supra*; and *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d 1256 (9th Cir. 1990), *cert. denied sub nom., Lockheed Shipbuilding Co. v. Director, Office of Workers' Compensaton Programs*, 498 U.S. 1073 (1991).

The amount of compensation payable is determined by the difference between the "weekly wage" calculated

in accordance with 33 U.S.C. Section 910 and the worker's post-injury earning capacity. "Earning capacity" is measured by actual post-injury earnings unless it is determined that actual earnings do not fairly and reasonably reflect earning power. In such cases, the Act requires the factfinder to consider the degree of physical impairment, the worker's customary employment, and "any other factors or circumstances in the case which may affect [the worker's] capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future" and fix a reasonable wage-earning capacity figure. *See* 33 U.S.C. § 908(h).

Except in cases involving "scheduled" injuries, the mechanism for measuring the duration of entitlement is as flexible and case-specific as that for determining the amounts payable. Benefits for the type of permanent partial disability originally awarded Respondent Rambo are "payable during the continuance of such partial disability," i.e., for as long as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment" continues. 33 U.S.C. §§ 902(10) and 908(c)(21).

The current version of the LHWCA contains only one mechanism – Section 22 – for adjusting or terminating benefits payable pursuant to an award. If "change in conditions" or "mistake in a determination of fact" is demonstrated and unless the parties agree to an adjusted payment, formal hearing conducted by an Administrative Law Judge in accordance with the requirements of the Administrative Procedures Act must occur and the Administrative Law Judge must reapply Section 8(h), reassess the worker's permanent earning capacity, and if

that capacity to earn has changed, order an appropriate adjustment to the original award. 33 U.S.C. § 919(d). The scope of any appeal of the Administrative Law Judge's decision to the Benefits Review Board or a Court of Appeals is limited to a review for errors of law and adherence to the substantial evidence standard. *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir. 1991).

Any attempt by an employer to unilaterally lessen or terminate payments due in accordance with an existing award is subject to enforcement proceedings and the probable assessment of substantial penalties. 33 U.S.C. §§ 914(f), 918, and 921(d); *see also Tidelands Marine Service v. Patterson*, 719 F.2d 126 (5th Cir. 1983); *Providence Washington Ins. Co. v. Director, Office of Workers' Compensation Programs*, 765 F.2d 1381 (9th Cir. 1985). Whenever the worker prevails in a dispute about the amount or duration of benefit entitlement, the employer is responsible for the worker's attorney's fees. 33 U.S.C. § 928.

This structure practically precludes the torrent of modification proceedings which Respondent Rambo argues will result if "conditions" is not restrictively defined. The fear that every "hiccup" in the economy will be followed by modification of existing awards is unfounded because neither change of circumstance nor mistake of fact guarantees modification. Only a proven change in earning capacity can have that result. Few parties will seek modification and bear all or at least their own costs when transitory economic shifts have had no lasting effect on the injury-related disability. The absence of a flood of modification proceedings in the ten years following the Board's opinion in *Fleetwood* is a telling

challenge to the likelihood that Respondent Rambo's fears will materialize.

RAMBO AND *FLEETWOOD* CONTRASTED

The facts of the *Fleetwood* and *Rambo* proceedings are closely parallel, the results completely opposite. Mr. Fleetwood, a recipient of LHWCA benefits for lessened earning capacity, acquired new skills and a new, more remunerative job. An Administrative Law Judge determined that Mr. Fleetwood's earning capacity had improved to a degree which extinguished the earlier loss and terminated benefits. The Benefits Review Board affirmed and Mr. Fleetwood appealed, arguing that modification pursuant to Section 22 was available only if his *physical* condition had changed.

The Fourth Circuit carefully distinguished the cases upon which Mr. Fleetwood relied and rejected his argument because "it is not in keeping with the purpose of the Act, which is to compensate workers for injuries that affect their wage-earning capabilities." *Fleetwood, supra,* at 1228-29. Presented with strikingly similar circumstances and the identical argument, the Ninth Circuit harkened back to its 60-year-old opinion in *McCormick S.S. Co. v. United States Employees' Compensation Commission,* 64 F.2d 84 (9th Cir. 1933), mischaracterized the true holding of that case,[7] and, without any discussion of statutory purposes or policies, reached the opposite result.

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[7] McCormick proves on careful reading to stand only for the unassailable proposition that a change in wages does not *necessarily* represent a change in earning capacity. The other Ninth Circuit precedent referenced in the decision below, *Pillsbury v. Alaska Packers Association,* 85 F.2d 758 (9th Cir. 1936), *rev'd*

The Ninth Circuit's single-page analysis asserted that its conclusion, although different from that reached by the Fourth Circuit, was consistent with the views of the First and the Fifth.

> The Fourth Circuit's rule conflicts with the positions taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor,* 673 F.2d 23, 25, n.6 (1st Cir. 1982) ('Courts uniformly have held that a "change in conditions" . . . means a change in the employee's *physical* condition, not other conditions.' (emphasis in original)); *Burley Welding Works, Inc. v. Lawson,* 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury,* and holding that '[i]t has been uniformly held that the term "change in conditions" . . . means a change in the employee's *physical condition,* and not other conditions.' (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

Rambo, supra, at 88 (J.A. 78).

The Court was at least partially mistaken. *Burley* is almost certainly no longer the law within the Fifth Circuit. The continuing validity of *General Dynamics* is doubtful. If there is a "clear weight of authority," it probably sides with *Fleetwood,* not *Rambo.* A discussion of the law in other Circuits appears at pages 27 to 35 of this brief.

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on other grounds, 301 U.S. 174 (1937), also involved no debate between changes in economic or physical conditions.

The Ninth Circuit did not discuss the policy implications of its requirement that physical change underlie modification. It did not explain why a worker with deteriorating physical problems should be entitled to increased benefits while an injured worker equally harmed by a changing economic environment should be denied similar relief. The Court provided no rationale for lessening the liability of employers when *physical* rehabilitation efforts succeed while refusing a similar adjustment when the development of new skills or the provision of reasonable accommodations to the worker's limitations assures continued employment. The Court offered no justification for continuing benefit payments to a worker who has fully regained his or her lost ability to earn.

The Fourth Circuit persuasively addressed each of these points.

> Under the Act, 'disability' is defined as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' 33 U.S.C. § 902(10). Thus, the Board was correct when it concluded that a worker is not compensated solely for physical impairment, but rather the worker is compensated for the future economic loss attributable to the physical impairment. The worker initially must prove his loss of wage-earning capacity to obtain benefits; therefore, his wage-earning capabilities should be relevant when considering a modification of an award. Thus, for example, if an employee initially was awarded a 40-percent partial disability award, and later found that his wage-earning

> capacity was much less than originally determined, he could then seek a modification. Likewise, an employer who finds that an employee's wage-earning capacity has not been affected to the degree originally determined should be able to seek a modification. As this case demonstrates, it is possible for a worker to show no physical improvement, but at the same time to acquire new job skills that enable him to compete again in the workforce. A sensible modification procedure would allow employees whose loss of wage-earning capacity becomes more apparent over time to obtain a larger disability award at a later date without requiring such an employee to demonstrate that his physical condition caused by the accident had changed. We fail to see how an employee whose wage-earning capacity had declined could be treated differently from the employee whose wage-earning capacity had improved without rendering inconsistent interpretations of the same statutory section of the LHWCA.
>
> Without such a modification procedure, workers who had secured new skills and employment would be receiving disability compensation when they were not disabled and an unequitable distribution of limited financial resource would result. . . . Overall, the statutory scheme indicates that as long as an employee's physical injury affects his wage-earning capacity, he should be able to obtain disability payments; but, he should not be able to receive a stream of constant payments regardless of his wage-earning capacity.

Fleetwood, supra, at 1229.

Only the Fourth Circuit's interpretation of Section 22 is consistent with the LHWCA's focus on earning capacity and the clear need for modification avenues in other contexts.[8] The Fourth Circuit's opinion both encourages and rewards the retraining and reemployment of injured workers. The Ninth Circuit's conclusion discourages that most effective remedy for economic loss.

THE MEANING OF "CONDITIONS" IS CLEAR

> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.
>
> * * *
>
> The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.

Estate of Cowart, at 2594.

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[8] LHWCA benefits for death are clearly intended to terminate upon the spouse's remarriage or end of a child's "student" status. *See* 33 U.S.C. §§ 909(b) and 902(18). If Section 22 requires physical change, the only route to an order terminating payments is unavailable. Post-award earnings must be reported on pain of benefit forfeiture. 33 U.S.C. § 908(j). If only physical change may justify benefit modification, no means of enforcing the reporting requirement exists. Some third-party settlements will require valuation of LHWCA entitlements and comparison with amounts received to determine appropriate credits and, in some instances, resolve disputes about forfeiture. *See* 33 U.S.C. § 933 and *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. ___, 112 S.Ct. 2589 (1992). A limited construction of "conditions" closes the only route to the necessary formal hearing.

This basic principle of statutory construction governed this Court's 1992 interpretation of the phrase "person entitled to compensation" and is no less applicable to the construction of Section 22's "change in conditions."[9]

In general usage, the normal meaning of "conditions" includes all circumstances attendant to the issue at hand.[10] Legal usage is more precise, defining "condition" as "a future and uncertain event upon the happening of which is made to depend the existence of an obligation." BLACK'S LAW DICTIONARY 265 (5th ed. 1979). Neither Webster nor Black distinguishes physical from other circumstances or possible events.

The issue at hand is earning capacity, a condition most dependent upon economic factors. Both physical and economic change qualify as "future and uncertain events" critical to the continuance of the payments needed to replace lost earning power.

Section 22 is no less clear than Section 33. The plain language rule should govern. "Conditions" should be construed in a manner consistent with Section 8(h), inclusive of all "circumstances in the case which may affect

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[9] *Cowart* also noted the fact that the "plain language rule" can sometimes collide with the rule requiring judicial deference to reasonable administrative interpretations. *Cowart, supra,* at 2594. That conflict is not present in this proceeding. The federal Respondent interprets Section 22 in the same manner argued by Petitioner Metropolitan.

[10] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1986) defines the plural "conditions" as "attendant circumstances" and reports the closest synonym of the most common usage of the singular to be "prerequisite."

[the worker's] capacity to earn wages in his disabled condition."

LEGISLATIVE HISTORY AND SUPREME COURT PRECEDENT

The history of the LHWCA and its several amendments contains no "smoking gun." It does, however, offer no support for the Ninth Circuit's construction and generally supports the conclusion that Congress intended that modification efforts be permitted to proceed whenever any change in any of the circumstances attendant to the original award are proven to have occurred.[11]

The Committee Reports to the 1934 amendments to Section 22 are identical. Both demonstrate Congress's latitude about the permissible grounds for modification and its continuing insistence that the time within which modification could be sought should be strictly limited.

> Section 5 of S.2794 [H.R. 8057] amends section 22 of the existing Act [by adding "mistake in a determination of fact"] so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the time period, extends the time within which such modification may be made. . . . [and] permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of

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[11] As discussed, *supra*, at 10-13, neither proof of changed circumstances nor proof of factual error assures modification. Such proof simply permits the formal hearing process and a reassessment of the worker's current earning capacity and compensable disability.

> fact makes such modification desirable in order to render justice under the Act. . . .

S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934).

In 1938, Congress not only amended Section 22 by assuring that modification authority existed in situations in which there had been a prior rejection of the claim, it also enacted current provisions 8(h) and 8(i), 33 U.S.C. Sections 908(h) and 908(i). The reports accompanying those changes demonstrate Congress's concerns about the long-term impact of injury upon workers' future abilities to earn, the expectation that modification rights existed if the post-injury earning power changed, and the belief that settlement was the best means of achieving finality and avoiding continuing readjustments to awards over long periods of time.

> [The proposed amendment adding subdivision (h) to Section 8] also provides for consideration of the effects of an injury, causing permanent partial disability, upon the employee's future ability to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. . . . considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future.
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> * * *
>
> In a case such as that referred to above where the employee returns to employment without

> apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the Act with respect to the filing of the claim for compensation and the right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act.
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> * * *
>
> The suggested addition of subdivision (i) to section 8 is designed to afford the interested parties the opportunity of amicably disposing of cases upon agreed settlements approved by the deputy commissioner, after approval by the Commission, where awards have been made under section 8(c)(21) and section 8(e). Experience shows that in many cases involving disabilities under these provisions (by which compensation is based on loss of earning capacity and is subject to readjustment from time to time over long periods) agreed settlements as approved by the deputy commissioner, with approval of the Commission, would be desirable and in the interest of all parties concerned.

S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

The next arguably relevant legislative history appears in the reports which accompanied the 1984 amendments to the LHWCA. The first of these reports, Senate Report No. 98-81, described the pertinent proposed amendments as intended to (a) assure that the sole

route to benefit adjustment was that provided by Section 22,[12] (b) reduce speculation about potential future losses of earning capacity, (c) broaden settlement authority, (d) impose income reporting requirements and the penalty of benefit loss for failure to report, and (e) remove existing time limitations on modification requests.

The Senate Bill proposed making vocational rehabilitation mandatory because "one of the prime purposes of workers' compensation [is] to return the injured worker to the labor market." The repeal of Section 22's time limitations in return for deletion of the language in Section 8(h) permitting too much speculation about future events was proposed to reduce the frequency of *de minimis* awards and to allow "claimants, for example, to apply for increased benefits for wage loss or for greater physical disability at a time when the full effects of an injury manifest themselves." *See* S. Rep. No. 98-81, 98th Cong., 1st Sess. 18, 36-38, 43-44 (1984).

Although it proposed amendments to other sections of S.38, the House Committee on Education and Welfare accepted the Senate's proposed revisions to Sections 8(h) and 22 and the Senate's proposal to enact Section 8(j). The Senate's efforts to amend Section 8(g) of the existing Act

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[12] As noted in *McCormick*, the version of Section 8(c)(21) in effect from 1927 until 1984 expressly permitted reconsideration of wage-earning capacity determinations and contained no time limitation. The history does not suggest that the repeal of Section 8(c)(21)'s language in 1984 was intended to restrict the grounds for modification. Instead, the apparent goal was to assure that all routes to award adjustment be governed by Section 22 and the Act's contested case provisions.

to make vocational rehabilitation mandatory and to forbid entry of an award for permanent disability until rehabilitation has been completed or determined unnecessary were not accepted. Pertinent portions of the House Report's section-by-section analysis echoed that of the Senate and characterized the grounds for modifications to be "changed circumstances or mistakes." In describing the proposed repeal of Section 22's one-year time limitations, the Committee expressed its intention that "the grounds for seeking a modification remain as they are under current law."[13] H.R. Rep. No. 98-570, 98th Cong., 1st Sess. 18, 27-29.

The Joint Explanatory Statement of the Committee of Conference issued on September 14, 1984 reported that mandatory vocational rehabilitation proposals were dropped because of differences between the House and the Senate regarding the extent to which "religious tenets" might justify refusal to participate. The conferees offered no explanation for their apparent agreement to repeal the reconsideration language of Section 8(c)(21), maintain the existing language in Section 8(h), and retain

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[13] Any contention that this reference qualifies as an endorsement of pre-*Fleetwood* law is weakened when it is recalled that the Benefits Review Board's opinion in *Fleetwood* was issued three months before the Conference Committee met and reported. If that opinion had been thought to effect a major change contrary to Congress's earlier expressions of understanding, surely there would have been some discussion by the conferees. It is more likely that the reference to existing standards was addressed to this Court's past decisions and the broad modification authority those cases confirmed. In any event, the statement is too ambiguous to overcome both the plain language rule and the balance of the history.

the one-year limitation in Section 22. Conference Report on S.38, Congressional Record-House, September 14, 1984, H.9592-9601.

As finally enacted, the 1984 amendments did not make participation in vocational rehabilitation mandatory and did not repeal any portion of Section 8(h). The unrestricted authority formerly extended Deputy Commissioners to adjust awards for permanent partial disability was folded into Section 22, and made subject to that section's continued one-year time limitation.

Read as a whole, the history of the Act and its amendments generally supports the view that Congress has consistently intended that awards of compensation for permanent partial disability be adjustable to changing factual circumstances, limited only by the strict one-year time limitation. Nothing in the history demonstrates an intent to limit "conditions" to only the worker's physical condition. Nothing in the history reflects a rejection of this Court's opinions that Section 22 displaces traditional principles of finality and *res judicata* and that Congress's reference to the alternate ground for modification – "a mistake in a determination of fact" – is inclusive of *all* facts.

> We find nothing in this legislative history to support the respondent's argument that a 'determination of fact' means only some determinations of fact and not others.

Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 465 (1968), *reh. den.* 391 U.S. 929 (1968).

> Thus, on its face, the section permits a reopening within one year 'because of a mistake in a

> determination of fact.' There is no limitation to particular factual errors, or to cases involving new evidence or changed circumstances. The Act at one time did authorize reopening only on the 'ground of a change in conditions,' 44 Stat. 1437, but was amended in 1934 expressly to 'broaden the grounds on which a deputy commissioner can modify an award . . . when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act.' S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H. R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934). The plain import of this amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 255-56 (1971), *reh. den.* 404 U.S. 1053 (1972).

Any mistaken factual determination can serve as grounds for modification. Whether the fact is one of a physical or economic nature matters not. That has been the rule for nearly thirty years – more than sixty if the distinction between jurisdictional and all other facts is ignored. *See Crowell v. Benson*, 285 U.S. 22 (1931). Absent a clear intention to define "conditions" much more narrowly than "fact," an equally broad construction must be given the alternative ground for modification. No such intent is expressed in the history. None should be inferred.

OPINIONS OF OTHER CIRCUITS

Although only the Fourth and the Ninth Circuit Courts of Appeal have directly addressed the question presented by this proceeding, the First, Second, Fifth, Seventh, Eleventh, and District of Columbia Circuits have issued opinions which shed light on their respective views. Petitioner has identified no decisions from the Third, Sixth, Eighth, or Tenth Circuits which provide any substantial assistance.

First Circuit Court of Appeals

Citing only *Burley Welding Works v. Lawson*, 141 F.2d 964 (5th Cir. 1944), in a footnoted comment clearly *dicta* to the actual holding that "courts uniformly have held that a 'change in conditions' means a change in the employee's physical condition, not other conditions," the First Circuit's opinion in *General Dynamics Corporation v. Director, Office of Workers' Compensation Programs*, 673 F.2d 23, 26, at n.6 (1st Cir. 1982), was one of the cases identified by the Ninth as supportive of its narrow construction of Section 22. *Rambo*, however, did not mention the First Circuit's subsequent commentary in *Williams v. Jones*, 11 F.3d 247 (1st Cir. 1993).

Williams involved an enforcement action brought in federal district court by an injured worker. The employer raised equitable defenses, arguing that the award had been obtained by recently discovered fraud. The District Court granted the petition for modification. Although that order was vacated because service of process was found insufficient, the Court affirmed the refusal to grant

equitable relief because it thought that Section 22 itself provided an adequate remedy for redressing any fraud.

> The LHWCA affords Jones an adequate remedy for redressing any fraud alleged in the affirmative defense. Eschewing conventional res judicata principles, section 922 allows an employer to request the ALJ to reconsider the case where there has been a 'change of conditions' or 'mistake of fact' warranting modification or suspension in compensation payments. See 33 U.S.C. Sec. 922; see also 20 C.F.R. Sec. 702.373; *Hudson v. Southwestern Barge Fleet Servs., Inc.*, 16 Ben.Rev.Bd.Serv. 367, 369 (1984) (holding that Sec. 922 was 'intended by Congress to displace traditional notions of res judicata') citing *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968)). (FN16) '[F]acts relating to the nature and extent of a claimant's disability typically are the subject of modification proceedings.' *Williams v. Geosource, Inc.*, 13 Ben.Rev.Bd.Serv. 643, 645 (1982). 'The factfinder [ALJ] has broad discretion to correct mistakes of fact, whether they be demonstrated by new evidence, cumulative evidence, or further reflection upon the evidence initially submitted.' *Id.* (emphasis added). The overarching criterion for reopening a compensation award under the LHWCA is whether reexamination would serve the 'interests of justice.' *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56, 92 S.Ct. 405, 406-07, 30 L.Ed.2d 424 (1971).

Williams, supra, at 257.

Although issued in the context of a "mistake of fact" modification analysis, it is difficult indeed to read into this passage anything other than the fundamental view

that Section 22 was intended to be read broadly and to fully displace traditional principles of finality and *res judicata.*

Second Circuit Court of Appeals

The Second Circuit almost certainly stands with the Fourth in its reading of the LHWCA's modification provision. In *Jarka Corp. v. Hughes,* 299 F.2d 534 (2d Cir. 1962), the Court struck down a modification order because the District Commissioner's findings were insufficient, remanding for further proceedings consistent with a discussion of Section 22 strongly indicative of the view that "mistake of fact" and "change in conditions" were equally broad.

Whatever doubts about the Second Circuit's modification standards might have remained following *Jarka* were greatly lessened by *LaFaille v. Benefits Review Board,* 884 F.2d 54 (2d Cir. 1989). Discussing the propriety of a *de minimis* award if on remand the Administrative Law Judge found no current loss of wage earning capacity, the Court stated as follows:

> Section 22 provides that an award that denies continuing compensation may be modified at any time within one year after the last payment of compensation on the ground either of a 'change in conditions' since the order or of mistake in the original determination of disability. Thus, '[a]n initial finding of no economic disability . . . may only be modified within one year of such finding, even though subsequent events make it apparent that the claimant has

suffered severe economic harm.' *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir. 1981).

Because of the 'potentially harsh effect of this relatively short statute of limitations,' where a physically impaired worker's potential right to compensation for the substantial loss of future earnings is a predictable probability, even if it is not a certainty at the time of hearing, de minimis awards have been approved in order to avoid the short statute of limitations of Sec. 22. *Id.* The court in *Hole* expressly held that concern for the avoidance of an irremediable error precluding future relief is appropriate under the LHWCA and under Sec. 8(h). Similarly, in *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), the court not only agreed with *Hole* that such awards were permissible, but also held that they should be made where the evidence shows a significant permanent physical impairment without a present loss of earnings.

Because the ALJ found that LaFaille sustained a 'permanent injury, a progressive obstructive lung disorder,' '[was] restricted in performing some of the physical aspects of the job of welder' and was spared demanding physical exertion by the kindness of his employer and co-workers in his job after he left General Dynamics, there is substantial evidence that he is likely to suffer a future loss of earnings as his condition deteriorates or when his environment changes. A finding of no economic disability and a denial of a de minimis award would prevent him from filing for future benefits for losses in earning capacity occurring after the one-year limitation of Sec. 22.

LaFaille, supra, at 62.

Unless it retreated substantially from this discussion, it is probable that the Second Circuit would conclude that change in a worker's employment "environment" is a sufficient basis for modification. It is far less likely that it would write into "change in conditions" a proviso excluding all but the physical.

Fifth Circuit Court of Appeals

Home to *Burley*, one of the principal cases thought by the Ninth Circuit to restrict modification to physical change,[14] the Fifth Circuit almost certainly lines up with the Fourth. From 1945 to 1994, all relevant decisions have confirmed the breadth of Section 22.

In *Standard Dredging Corp. v. Henderson*, 150 F.2d 78 (5th Cir. 1945), the Court concluded that Section 22 was the appropriate statutory basis for terminating death benefits on the ground that the dependent status of survivors had changed and that benefits payable "during such dependency" should end or lessen. In *Godfrey v. Henderson*, 222 F.2d 845 (5th Cir. 1955), both the majority and dissenting opinions clearly shared the view of Section 22

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[14] *Burley*, carefully read, stands only for the unassailable proposition that higher wages do not "conclusively establish" a change in earning capacity. Its statement that "it has been uniformly held that 'change in conditions' . . . means a change in the employee's physical conditions, and not other conditions" was not essential to the ruling and was itself premised upon *McCormick S.S. Co. v. United States Employees Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), and *Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937), both of which are discussed above, at pages 14-15, n.7

later expressed in *Fleetwood*.[15] And, of course, the basic premise of *Hole v. Miami Shipyard Corporation*, 640 F.2d 769 (5th Cir. 1981), is wholly inconsistent with the Ninth Circuit's analysis of Section 22.

An Administrative Law Judge awarded Gordon Hole benefits for a 1% permanent partial disability because he could not accurately assess his earning capacity and thought it best to keep the case alive for later modification if a demonstrable change in earning capacity occurred. The Benefits Review Board reversed because it thought the award too speculative and violative of Section 22's one-year limitation on modification. The language chosen by the Fifth Circuit in reversing the Board makes express the Fifth Circuit's current, expansive interpretation of Section 22.

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[15] After concluding that the Deputy Commissioner's determination that Mr. Godfrey was totally disabled was supported by substantial evidence, the majority specifically noted that further adjustments to the award were possible.

> Should it develop in the future that he can obtain employment, it would then be time to revise the original order.

Godfrey, supra, at 849.

Although the dissenting judge challenged what he felt was the majority's *de novo* review of the factual record, he also emphasized the liberality of Section 22 and the prospects for further modification.

> With this in mind and also in mind that the commissioner may, indeed must, if conditions change, reconsider and again modify his award, I do not see how we can, under the controlling rule of law which the majority opinion correctly sets out, upon this record, set aside the finding and award of the commissioner.

Godfrey, supra, at 849 (dissenting opinion).

> The LHWCA does not provide compensation to injured workers for physical injuries standing alone but only for 'disability,' defined by 33 U.S.C. § 902(10) as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' However, it will often be impossible at the time a claim is filed to determine the *precise* degree of economic harm suffered by a claimant. Therefore, 33 U.S.C. § 922 provides that an award of compensation may be modified at any time within one year after the last payment of compensation. Such a modification may be made either on the ground of changed conditions or on the ground of a mistake in the original determination of disability. Thus, if an initial determination is made that a claimant has suffered some degree of economic harm, however slight, and circumstances later develop indicating that the claimant was harmed to a greater or lesser degree than was originally apparent, the compensation award may be modified years later to reflect this greater or lesser economic injury.

Hole, supra, at 772. *See also Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, at 1046, n.6 (5th Cir. 1992), approving *Fleetwood* as in keeping with the purposes of the Act.

Whatever may be the validity of a rule that Section 22's one-year limitation period may be extended whenever thought unfair, the approval of *de minimis* awards *must* reflect agreement with *Fleetwood's* modification analysis.

Seventh Circuit Court of Appeals

The Seventh Circuit's decisions are mixed and not particularly instructive. *Eifler v. Office of Workers' Compensation Programs*, 926 F.2d 663 (7th Cir. 1991), presumes that physical change is required for modification. On the other hand, *Pearce v. Director, Office of Workers' Compensation Programs*, 647 F.2d 716, at 727, n.16 (7th Cir. 1981), suggests that changes in interest rates may qualify as a "change in conditions." *Amax Coal Company v. Franklin*, 957 F.2d 355, at 358 (7th Cir. 1992), acknowledges that "the reopening provision is to be interpreted generously" but implies that the generosity was intended to extend only to the claimant.

Eleventh Circuit Court of Appeals

Although far from necessary to their holdings, *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, at 780 (11th Cir. 1985), and *Director, Office of Workers' Compensation Programs v. Drummond Coal Co.*, 831 F.2d 240, at 246, n.9 (11th Cir. 1987), *reh. den.* 837 F.2d 1095 (1988) do state that "change in conditions" refers to a change in an employee's physical condition. The First Circuit's opinion in *General Dynamics* is offered as support for this characterization of the statute. The issue presented in this proceeding is now pending before the Eleventh Circuit in *Eller & Company v. Director, Office of Workers' Compensation Programs*, No. 93-8095.

District of Columbia Circuit

The District of Columbia Circuit appears aligned with those approving *Fleetwood's* analysis. In *Washington Terminal Co. v. Hoage*, 79 F.2d 158, at 160-61 (D.C. Cir.

1935), the Court concluded that modification was appropriate despite no change in physical condition when a claimant started to use glasses after receiving an award for uncorrected vision loss. The decision in *Chapman v. Griffith-Consumers Co.*, 107 F.2d 263, at 266 (D.C. Cir. 1939), characterized the delayed appearance of persons entitled to death benefits as a "change in conditions" sufficient for modification of an order requiring payment of "in lieu of dependents" money to the Special Fund. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, at 794 (D.C. Cir. 1984), specifically adopted *Hole's de minimis* analysis and, necessarily, *Fleetwood's* reading of "change in conditions."

Hoage, Chapman, and *Randall* are not mentioned when the Court, in later *dicta,* cited *Verderane* and *General Dynamics* for the view that "conditions" encompassed only "physical condition." *See Director, Office of Workers' Compensation Programs v. Edward Minte Co., Inc.*, 803 F.2d 731, at 735 (D.C. Cir. 1986). A similarly unnecessary and conclusory characterization appears in *Washington Society for the Blind v. Allison*, 919 F.2d 763, at 769, n.46 (D.C. Cir. 1990).

CONCLUSION

As used in Section 22, "conditions" is intended to encompass all of the circumstances determinative of earning capacity. Neither plain usage nor the history and purposes of the LHWCA permit a construction which both strips the chosen term of its plural form and inserts a limiting *proviso* not selected by Congress. To paraphrase this Court's concluding comment in *Director, Office of*

Workers' Compensation Programs v. Rasmussen, 440 U.S. 29, 47 (1979), when Congress has put down its pen, a court may neither rewrite Congress's words nor insert additional terms.

The Administrative Law Judge determined that Respondent Rambo's vocational skills and job opportunities had changed following the date of the original award. He found that these changes had increased Respondent Rambo's earning capacity to a degree that he no longer experienced a compensable disability and, as instructed by the statute, terminated benefits. All findings were supported by substantial evidence. The termination of benefits based upon a "change in conditions" was in accordance with law. The Ninth Circuit's opinion must be reversed.

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Respectfully submitted,

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